

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

77-6114

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To be argued by
DONALD F. COPELAND

In The
UNITED STATES COURT OF APPEALS
For The Second Circuit
*

FRIENDSHIP DAIRIES, INC., POLLIO DAIRY
PRODUCTS CORP., CROWLEY FOODS, INC.,
QUEENSBORO FARM PRODUCTS INC., SARATOGA
DAIRY, INC., DELTOWN FOODS, INC., ELMHURST
MILK AND CREAM CO., INC., QUEENS FARMS, INC.,
and CUBA CHEESE AND TRADING CO., INC.,

Plaintiffs-Appellants,

-against-

EARL BUTZ, Secretary of the Department of
Agriculture of the United States,

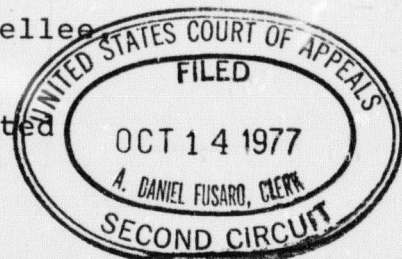
Defendant-Appellee,

-and-

PENNMARVA DAIRYMEN'S COOPERATIVE
FEDERATION, INC.,

Intervenor-Appellee

From an Order and Judgment of the United
States District Court for the Eastern
District of New York in 75c 1517.



BRIEF FOR INTERVENOR-APPELLEE

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COUNTER STATEMENT OF ISSUE PRESENTED FOR REVIEW

Must the Secretary justify a pricing provision of a milk marketing order in an amendment hearing, where the hearing is called to consider provisions of that order other than that pricing provision.

COUNTER STATEMENT OF THE CASE

Intervenor-Appellee, Pennmarva Dairymen's Cooperative Federation, Inc. (Pennmarva) is a federation of five cooperatives representing approximately 6,000 dairy farmers. Pennmarva was permitted to intervene in the District Court pursuant to F.R.C.P. 24(a)(2).

Appellants appeal from an Order of the District Court dismissing Appellants' Complaint. The basis of this appeal is an Order of the Secretary of Agriculture (Secretary) amending a Class II pricing provision of eight milk marketing orders including Milk Marketing Order Number 2 (Order 2).

A. Economic Background of the Case

Plaintiffs' complaint evolves from a milk order hearing held in Washington, D. C. during the period February 20, 1974 through February 28, 1974. The hearing was convened to consider the Class II pricing provisions in eight northeastern milk marketing orders. The technicalities regarding the eight milk marketing orders, their pricing provisions, the notice of hearing and the hearing itself are discussed in detail in the decision of the Judicial Officer, (JA 1286a-1343a) and therefore will not be reiterated herein.

The cooperatives which make up Pennmarva, which cooperatives represent approximately 6,000 dairy farmers principally involved in supplying the Federal Order 4 marketing area, were very much affected by the economic and marketing conditions which led to the amendment hearing here under attack. It is clear on the record that many of the farmer members of the Pennmarva cooperatives did not survive the devastating period of rising costs and falling milk prices which created the intolerable situation the Secretary sought to alleviate through the subject hearing. From the farmers' point of view, there are many aspects of the background of this case, all substantiated in the record and decision of the Judicial Officer, which we consider significant and which should be brought to the attention of this Court. Only through an understanding of the economic and marketing conditions prevailing at the time in question can the Secretary's actions be fully understood. While the law requires that the Secretary's action be in accordance with law notwithstanding the exigency of the circumstances moving him to act, the District Court did find that the action of the Secretary was based upon substantial evidence in the hearing record and the Judicial Officer's decision, based upon that record, was in accordance with law.

The significant facts of the economic and marketing conditions confronting farmers in February, 1974, are detailed in the Judicial Officer's finding of fact number 8. (JA 1297a) The following is a summary of those facts, which are supported by the record and the Judicial Officer's findings:

The butter powder formula provisions (hereinafter referred to as b-p price or b-p snubber) were added to the eight orders being considered in the amendment hearing as an alternative basis for pricing milk along with the Minnesota-Wisconsin Price Series (hereinafter referred to as M-W Series), the original pricing provision, in order to establish a fixed margin for reserve milk used in butter and non-fat dry milk powder. This was necessary because there were substantial supplies of reserve milk in the northeast markets which had to be cleared from the market and they constituted a burdensome problem. The alternative pricing provisions helped to assure the clearing of the market. Since mid-1972, milk supplies in the Northeast declined substantially. There was a substantial decline in the quantities of reserve milk manufactured into butter and powder and the preexisting problem of clearing the market was no longer the burdensome problem of earlier years.

In fact, during nine of the twelve months in 1973, the M-W Series (which price was also used as the basic formula price to arrive at the Class I price) was lower than the b-p price and was the effective Class II price for the Orders 2 and 4 markets as well as the other six northeast markets being considered.

In October of 1973, due to substantial imports of butter and non-fat dry milk powder into the United States, the butter powder price in the eight orders became distorted and the price fell below the true use value of the reserve milk. For instance, by January 1974, the b-p price fell below the M-W Series by \$1.18. This distortion brought clearly into focus the question whether or not the use of the b-p price as a snubber to the M-W Series tended to carry out the objective of pricing reserve milk so as to afford producers an adequate return. In addition, on February 19, 1974, the Secretary issued a decision involving thirty-nine marketing orders providing that reserve milk in those orders be priced at the M-W Series. Thus, the continued use by the northeast orders of the b-p price snubber created a serious problem of misalignment of the reserve milk price with the thirty-nine orders to the west.

The eight orders in the east, in conjunction with the thirty-nine orders to the west which had eliminated the b-p price snubber, accounted for 85% of the nation's butter, 97% of the nation's cheese and 87% of the nation's non-fat dry milk powder and therefore, elimination of the b-p price snubber in the eight northeast orders would promote orderly marketing through alignment of the reserve milk price. It should be noted that the manufactured products produced from the reserve milk in the eight northeast orders compete with similar products manufactured in some of the thirty-nine orders to the west.

The radical decline in the b-p price which began in October of 1973 resulted in a significant drop in the blend price paid to producers at a time when the producers were experiencing a substantial increase in the cost of production. While dairy income rose approximately 10% in 1973, nevertheless, the cost of production increased approximately 20% from the year earlier. Because of this cost-price squeeze, there was a substantial and progressive decline in the number of dairy farms and in the numbers of cows in production and production per cow. Future supplies of milk were being jeopardized by the continuing decline in production.

The decline in blend price was substantial. For example, in December of 1973, the blend prices in Orders 2 and 4 decreased \$.47 and \$.54 respectively. It was estimated that the gross effect of the reduction of blend price upon farmers in the eight northeast orders in the month of December 1973 was \$8,189,200. Thus, on the basis of the December 1973 figures, it became evident that dairy farmers in the eight orders were suffering a loss of approximately \$275,000 for each day that the distorted b-p price remained in effect. It became evident, from the cost-price squeeze which was resulting in the culling of herds and many producers going out of business, that an increase in the milk price to producers was essential if an adequate supply of milk was to be maintained.

Obviously, the continued use of the b-p price on a long term basis could continue to depress the blend price payable to producers which would be counter-productive and could result in there being insufficient supplies to meet existing and anticipated needs. Such a situation clearly would be contrary to the stated purpose of the Agricultural Marketing Agreement Act. The effect would be felt not only in the eight northeast orders but would be felt in every federally regulated area in the United States. In addition,

the misalignment created by using the b-p price snubber in the eight northeast orders while the thirty-nine orders to the west were using the M-W Series would be violative of the uniform pricing provisions among these several federal orders and could result in serious dislocation of production facilities.

It became evident with declining production that there was a need for additional milk production in order to assure an adequate supply and that this could only be brought about if there was a higher and adequate price for producers. The rapid decline in milk production made it imperative that the b-p price be eliminated from the pricing provisions at the earliest possible time. Mounting evidence of losses in income to producers, in producer numbers and in the volume of production made it necessary that the Secretary take emergency action to eliminate the b-p price provision.

It should also be noted that before the Secretary's decision could be implemented it was necessary under the law that the pricing provisions be approved by the producers in a referendum. The referendum was duly held and more than two-thirds of the producers in the eight federal order markets

affected approved the Secretary's decision.

Notwithstanding the substantial losses being suffered by producers as a result of the reduction in the blend price, the plaintiffs apparently were enjoying a bonanza obtaining milk for manufacturing purposes at a price less than its use value. It is noteworthy that the Judicial Officer stated at page 49 of his decision (JA 1334a) that the assistant secretary observed that exceptions filed by the plaintiffs were essentially directed at the level of prices rather than the efficacy of the M-W Series. While the plaintiffs supported the use of the M-W Series in the nine months of 1973 when that price was lower than the b-p price, the longer the depressed b-p price continued to be the effective price, the longer plaintiffs could enhance their profits at the expense of farmers by obtaining their milk at less than use value and selling their finished product at current market prices.

Thus, the Secretary's action was a well reasoned decision based upon substantial record evidence of conditions which were resulting in disorderly marketing conditions and resulting in disastrous effects upon farmers and unreasonable economic benefit upon plaintiffs.

B. Order Provisions Prior to Contested Amendment

To fully understand the sequence of events leading to the Order provisions which are the subject of this appeal, we must begin with the earliest, relevant pricing provision. In 1961, the M-W Series was adopted as the basis for pricing Class II milk. Thereafter, in 1968, as hereinbefore discussed, the b-p formula price was added as an alternative basis for pricing milk in order to establish a fixed margin for reserve milk used in butter and non-fat dry milk powder. These pricing provisions were adopted pursuant to lawful administrative hearings and were the lawful pricing provisions at the time of the hearing here in question.

When the original pricing provision containing the M-W Series went into effect in 1961, it was promulgated on the basis of a hearing record. The validity of that determination is not contested herein.

In 1968, on the basis of a hearing record, the Secretary determined that in order to clear the markets it was necessary to adopt the b-p price as an alternative pricing provision. Therefore, the b-p price was added as an alternative pricing mechanism, but its addition did not change or alter the M-W Series.

Until mid-1972, the b-p price provision, serving as an alternative pricing provision, helped to clear the market. In mid-1972, milk supplies declined drastically. In October, 1973, there were substantial imports of butter and powder causing the price to fall below the true use value of the reserve milk supply. There were radical drops in the blend price paid to producers at a time when producers were experiencing increases in the costs of production.

The continued use of the b-p price as an alternative pricing mechanism was no longer needed to clear the market and its use was resulting in a depression of the blend price payable to producers. The resulting rapid decline in milk production made it imperative that the b-p price be eliminated as soon as possible.

The Secretary called the subject hearing and there was substantial evidence elicited that the b-p price no longer served a useful purpose and should be eliminated. Based upon the hearing record, the Secretary eliminated the b-p price and reverted to the M-W Series as the sole price determinant for Class II milk. In doing so, the Secretary did not adopt anything new, he simply continued the original pricing provision without the b-p price snubber.

C. The Proceedings Below

The hearing call contained 17 proposals. (JA 3a-8a) Each of the 17 proposals provided, and the District Court so found (JA 1466a), for the retention of the M-W Series. It was a long established pricing provision which not even Appellants contested, so long as Appellants had the benefit of the b-p snubber. The root of Appellants' objection is that elimination of the b-p snubber deprived them of the economic windfall they had enjoyed.

The only doubt regarding the validity of the M-W Series was expressed by handlers such as Appellants who lost an economic advantage through elimination of the b-p snubber. Appellants contended that the M-W Series was rigged, thereby attempting to discredit the Series. The Initial Decision of the Administrative Law Judge, based upon the Affidavit of Robert W. March, clearly lays to rest such assertions (JA 1332a). Even if attempts to rig the Series were in fact made, they would have no significant effect upon the Series even if successful.

In an effort to halt or delay action by the Secretary, Appellants requested material which would take substantial time and effort to produce. Counsel for the

Secretary pointed out that it would take approximately two months to produce what was requested. (JA 591a)

The retention of the M-W Series not being a consideration of the hearing, and in light of the economic exigency existing in the market place, the Secretary implemented the subject Order eliminating the b-p snubber.

An appeal to the Secretary pursuant to 7 U.S.C. 608c(15)(a), the Administrative Law Judge found that the Secretary's decision and order were supported by substantial evidence (JA 1286a-1343a). On appeal from the Initial Decision of the Administrative Law Judge, the Judicial Officer affirmed adopting the Initial Decision as his final Decision (JA 1347a).

Appellants then appealed to the District Court. Judge Neaher found that the Secretary's Decision and Order were supported by substantial evidence and dismissed the Complaint. More significantly, Judge Neaher found that the M-W Series was a "given" of the hearing and its validity beyond the scope of the hearing (JA 1466a).

ARGUMENT

I. Substantial Evidence is Not Required to Justify Existing Order Provisions in an Amendment Hearing

The Secretary's Order did not "impose" the M-W Series upon Appellants. The M-W Series had been the pricing provision prior to 1968 when the b-p snubber was introduced as an alternative. The hearing was called to consider whether the b-p snubber was still a viable alternative. On the basis of the hearing record evidence, the Secretary concluded that the b-p snubber no longer tended to effectuate the purposes of the Agricultural Adjustment Act and eliminated the provision. That Decision and Order are supported by substantial evidence.

Appellants do not contest that the M-W Series was contained in the Order as a pricing provision prior to the subject amendment Order. Nor do they contest that there was substantial record evidence to support the Secretary's removal of the b-p snubber. Rather, Appellants base their argument on the proposition that elimination of the b-p snubber left the M-W Series as the sole pricing mechanism. They reason from that premise that the M-W Series must be justified in the same terms as it was justified in 1961 when first introduced into the Order. In short, Appellants

treat the hearing as a promulgation hearing where all provisions are open to consideration rather than an amendment hearing where only certain provisions specified in the hearing notice are open to consideration.

The notice of hearing spelled out clearly that the hearing was an amendment hearing called with respect to the proposed amendments. The purpose was to receive evidence relevant to the proposed amendments.

The Rules of Practice and Procedure (7 C.F.R. §900.4(a) and §900.8(c)(2) provide in relevant part that the hearing notice describe the subjects and issues involved in the hearing and that evidence be received with respect to the matters so specified.

Thus, the only relevant part of the pricing provisions open to consideration was the b-p snubber as set forth in the hearing notice. The hearing notice did not concern the question of dropping the M-W Series; rather all proposals considered at the hearing retained the M-W Series. As the District Court concluded, the M-W Series was a "given" of the hearing and the question of dropping the Series was not open to consideration. (JA 1466a).

The M-W Series being a "given" of the amendment hearing, the substantial evidence rule does not require

justification of its retention. Treating an amendment hearing in the same manner as a promulgation hearing would lead to the conclusion that in every amendment hearing all provisions would be open and subject to justification as in a promulgation hearing, notwithstanding prior justification of the provision having been had.

Further, such a conclusion would appear to be contrary to the Rules of Practice and Procedure which contemplate and provide only for evidence with respect to the matters specified in the notice.

Legal authority cited by Appellants is not helpful to their position. Fairmont Foods Company V. Hardin, 442 F.2d 762 (CA DC, 1971) involved a location differential provision adopted by the Secretary in a milk marketing order. The issue involved there was whether the differential was justified on the limited grounds permitted by Congress. The Court found no evidence that the differential fit within those limited grounds and therefore fell outside the scope of the Secretary's authority. That case did not involve retention of an existing order provision.

George Benz & Sons V. Hardin, 342 F.2d 88 (CA 4th, 1972) involved the expansion of a milk marketing order. Plaintiff, a handler brought under regulation, argued the

expansion was not supported by substantial evidence. The Court found the Secretary's Order was supported by substantial evidence.

Goldberg V. Kelly, 397 U.S. 254 (1970) involved the termination of public assistance payments without affording the recipient an opportunity to be heard. In the instant case, there is abundant evidence to support the elimination of the b-p snubber.

Ohio Bell Tel. Co. V. Comm'n, 301 U.S. 292 (1937) involved an order of the Public Utility Commission requiring a refund of rates previously collected based upon facts not in the record. As in Goldberg, the administrative action set aside was not supported by substantial evidence. In the instant case, the administrative action was elimination of the b-p snubber and the Secretary took no action with respect to the M-W Series.

Baltimore & Ohio R. Co. V. Aberdeen & R.R. Co., 393 U.S. 87 (1968) involved the division of joint rates pursuant to the Interstate Commerce Act. The Commission sought to justify the division on the basis of territorial average costs without evidence to show such costs represented the costs of North-South traffic. There, the Commission was promulgating a new division. There was no question of

justification of an existing rate.

Abbotts Dairies Division of Fairmont Foods, Inc.

V. Butz, 389 F. Supp. 1 (E.D. Pa., 1975) involved the elimination from a milk marketing order of a bracketed pricing system. The Court found that all of the evidence in the record supported a bracketed system and there was no evidence to support removing it. Abbotts did not involve justifying in an amendment hearing an existing order provision.

Morgan V. United States, 298 U.S. 468 (1935),

decided under the Packers and Stockyards Act, involved rates set by the Secretary. Plaintiffs alleged that the decision was made by the Secretary without reference to the record evidence. The Supreme Court reversed the lower court's dismissal of the case holding that the Packers and Stockyards Act provides for a full hearing and plaintiffs had the right to judicial determination of whether the Secretary's decision was supported by substantial evidence. Morgan involved the promulgation of a rate unsupported by substantial evidence and there was no issue of justifying an existing rate.

II. The Decision and Order are Supported by Substantial Evidence

The Judicial Officer discusses in finding number 8 (JA 1297a) of his decision the relevant history of the reserve milk pricing provisions of the orders. He points out that the M-W Series is also used as the basic formula price to arrive at the Class I price in each of the orders. The M-W Series was first adopted in the Chicago marketing order in September 1961 and is now used in all 61 of the Federal Milk Marketing Orders throughout the nation. (Finding of Fact No. 6; JA 1294a). As pointed out by the Judicial Officer in Finding of Fact number 8, the b-p price was added to the orders as an alternative basis for pricing reserve milk to assure a fixed margin under the market value of butter and non-fat dry milk powder. For a period of time, this was necessary to clear the markets of reserve milk. However, as supplies declined steadily from mid-1972 clearing the markets was no longer a burdensome problem and the alternative basis of the b-p price was no longer necessary in order to clear the markets. The Judicial Officer points out that during nine of the twelve months of 1973, the M-W Series was lower than the b-p price and was the effective price for reserve milk in the northeast markets.

The M-W Series has been used in the markets since the beginning of 1961. The plaintiffs took advantage of that price during the first nine months of 1974. The Judicial Officer points out at page 49 of his decision (JA 1334a) that no challenge is made by the plaintiffs to other order provisions which are structured upon the M-W Series nor do they challenge the M-W Series as an effective price determinate for reserve milk at times when the b-p formula did not apply.

The contested hearing was an amendment hearing and it is not necessary in such a hearing that every provision of the existing order be justified. As already pointed out, the M-W Series had been used since approximately 1961, and is used in all of the Federal Orders throughout the nation. The b-p price was later added as an alternative pricing basis to meet a specific need. When that need no longer existed, the Secretary recognizing that fact, removed the provision on the basis of the record evidence.

Plaintiffs attempt to discredit the M-W Series averring that the price was "rigged". They attempted to offer a deposition of one Dwight Morris, which, they alleged, substantiated their claim. Plaintiffs introduced the

deposition of Dwight Morris, taken in another, unrelated, matter, by attaching it to exceptions filed to the long-range pricing decision. In response, an affidavit by Robert W. March, was filed on October 1, 1974 in rebuttal to the Morris deposition. At page 47 of his decision (JA 1332a), the Judicial Officer points out that the March affidavit satisfactorily refutes any implication of rigging of the M-W Series. The Judicial Officer notes that the M-W Series is based upon reports from a large number of plants and that the Department of Agriculture was apprised of efforts to rig the price that the Department monitored the sixteen affected manufacturing plants closely and that they were only sixteen out of 754 plants. Prices paid by these 16 plants were in the range of prices paid by other plants and there was no significant impact on the M-W Series.

The M-W Series had a long established use as the basis for pricing reserve milk in the northeast orders as well as in all of the orders across the nation. There was no basis on the record for the Secretary to conclude that any attempted tampering with the price series had any significant impact upon the price or that the series was not reliable for use in pricing to carrying out the declared purposes of the act.

CONCLUSION

For the reasons stated herein and in the opinion of the Court below, the judgment of the Court should in all respects be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MARIE MULHALL , being duly sworn, deposes and says:

I am over the age of eighteen (18) years and am not a party to this action.

On the 13th day of October, 1977, I served 2 copies each ~~except~~ of the annexed paper upon Cyril Hyman, Esq., Deputy Chief, Civil Division, Office of the U.S. Attorney, Room G-80, 225 Cadman Plaza East, Brooklyn, New York 11201; Daniel Wentzell, Esq., Room 2006-S, United States Department of Agriculture, Washington, D.C. 20250; David C. Toomey, Esq., Messrs. Duane, Morris & Heckscher, 1600 Land Title Building, Philadelphia, Pennsylvania 19110

by depositing ^{copies} a true/~~copy~~ of the same in a properly addressed postpaid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Post Office Department located in the City, County and State of New York.

Maria Mulhall

Sworn to before me this
13th day of October , 1977.

Loretta J. Hottinger

LORETTA J. HOTTINGER
NOTARY PUBLIC, STATE OF NEW YORK
100-1442035
Office: Westchester County
Certified: State of New York County
Commission Expires March 29, 1979